Counsel for first respondent requested leave of the court to file an appeal against the court's ruling on the preliminary objection. In view of the fact that such leave would be inconsistent with the finality of the Order made herein the court refused leave to appeal.

Order accordingly.

Solicitors: *K. Vijaya; Karpal Singh & Co.*

QUALITY TRACTORS (M) SDN. BHD. v. UNITED ASIAN BANK BHD.

[O.C.J. (Vohrah J.) January 19, 1979]

[Kuala Lumpur — Civil Suit No. 3379 of 1979]

Practice and Procedure — Costs — Security for costs — Plaintiff company in receivership — Discretion of the court — Companies Act, 1965, s. 351.

The plaintiffs had issued four writs against the defendant bank claiming damages in relation to a number of dishonoured cheques. The bank demanded immediate payment of the sum of $1,008,541.76 cts. alleged to be due to them and as holder of two debentures they appointed Receivers and Managers in respect of the company. In a different suit the plaintiffs obtained an *ex parte* injunction restraining the Receivers and Managers from acting. This injunction was subsequently ordered to be dissolved and an appeal was pending against the order. The defendants applied for an order that the plaintiffs do furnish security for costs in the action.

Held: the question of security for costs is a matter of discretion for the court to be exercised in all the circumstances of the case. In this case in view of all the circumstances the court's discretion should be exercised in favour of the plaintiffs and the application for security for costs should be dismissed.

Cases referred to:-

(1) *Newhart Development Ltd.* v. *Co-operative Commercial Bank Ltd.* [1978] 2 W.L.R. 636.

(2) *Sir Lindsay Parkinson & Co. Ltd.* v. *Triplan Ltd.* [1973] 2 W.L.R. 632.

(3) *R.A. Cripps & Son Ltd.* v. *Wickenden & Anor.* [1973] 1 W.L.R. 944.

(4) *Pearson & Ors.* v. *Naydler & Ors.* [1977] 1 W.L.R. 899.

(5) *Tradestock Pty. Ltd.* v. *TNT (Management) Pty. Ltd. & Ors.* 14 A.L.R. 52.

CIVIL SUIT.

Teh Boon Eng for the plaintiffs.

C. Abraham for the defendants.

Vohrah J. (delivering oral judgment): Counsel for the defendants at the outset indicated that he was proceeding with his application (Enclosure 13) only in so far as it relates to the prayer that the plaintiffs furnish security for costs in this action. As an order that security be provided is a discretionary order I have to consider how my discretion should be exercised in this case.

Some time in November 1977 the plaintiffs issued 4 writs against the defendant bank claiming damages in relation to a number of dishonoured cheques. On January 20, 1978 the bank demanded immediate payment of the sum of $1,008,541.76. On January 23, 1978 the bank as holder of two debentures dated November 4, 1975 and October 15, 1977 appointed Receivers and Managers in respect of the plaintiff company. In a different suit (Civil Suit 638 of 1978) between the same parties, the plaintiffs obtained an *ex parte* injunction restraining the Receivers and Managers from acting. This injunction was ordered to be dissolved on June 26, 1978 and there is now pending an appeal in the Federal Court against the order.

My attention has been drawn to a number of authorities, namely, *Newhart Developments Ltd.* v. *Co-operative Commercial Bank Ltd.*,(1) *Sir Lindsay Parkinson & Co. Ltd.* v. *Triplan Ltd.*,(2) *R.A. Cripps & Son Ltd.* v. *Wickenden & Anor.*,(3) *Pearson & Anor.* v. *Naydler & Ors.*,(4) *Tradestock Pty. Ltd.* v. *TNT (Management) Pty. Ltd. & Ors.*,(5) and also to section 447 of the English Companies Act, 1948 which is *in pari materia* with section 351 of our Companies Act. Reference has also been made to *Kerr* on the Law and Practice as to Receivers (13th Edition). I am obliged to counsel for their diligence in furnishing me with the relevant law.

It was urged by counsel for the defendants that I should make an order for security for costs unless the plaintiffs have made out special circumstances justifying the exercise of discretion in their favour. I consider, however, that it is clear from the majority view in the Court of Appeal in *Parkinson's* case that there is no such restriction on the exercise of the discretion: it is simply a discretion to be exercised in all the circumstances of the case. From the *Tradestock* case it seems that this view has been adopted in Australia with regard to section 363(1) of the Companies Act (*Vic*) which is identical to our section 351 and is *in pari materia* with the English section 447. In that case Smithers J. at page 56 said: —

> "It is clear, however, that the real problem is to determine whether, in the circumstances of that case, the court ought to take the view that the protection should not be afforded to the defendant. No doubt the answer is to be found by ascertaining where, on considerations of what is just and reasonable, the balance rests between the risk of exposing an innocent defendant to the expense of defending his position and the risk of unnecessarily shutting out from relief a plaintiff whose case if litigated would result in his obtaining that relief."

I must say that I cannot find any evidence of *mala fides* on the part of the plaintiffs in bringing their claims. Indeed I note that the defendants have not at any stage suggested or ever hinted that this was the case. Nor has any statement of defence been filed to date. To use the words of Mars-Jones J. in *Parkinson's* case, "nothing I have read or heard has led me to believe that this is anything but a claim put forward in good faith. . .". I have no doubt that the defendants in this case are fully aware that so long as the plaintiff company is in receivership it is unable to control its own finances and that an order for security for costs would almost certainly bring these consolidated claims to an abrupt and final end. It seems to me that it is the very action of the defendants in placing the plaintiff company in receivership which has incapacitated the plaintiffs financially and put them in a position where it would be extremely difficult if not impossible to comply with an order for security for costs. Having considered all the circumstances I am of the view that the court's discretion in this case should be exercised in favour of the plaintiffs and accordingly I affirm the order I made in chambers dismissing the application of the defendants praying for security for costs.

Costs in the cause.

Order accordingly.

Solicitors: *Shearn Delamore & Co.; Jagjit Singh & Co.*